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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DENNIS SOCHOR,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE OF THE STATE OF FLORIDA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
BECAUSE THE WORDS OF FLORIDA'S "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE LACK ANY DIRECTIVE CONTENT, A LIMITING CONSTRUCTION OF THE CIRCUMSTANCE MUST BE COMMUNICATED TO THE PENALTY JURY—WHICH FOR EIGHTH AMENDMENT PURPOSES IS THE ONLY REAL CAPITAL SENTENCER IN FLORIDA	4
A. Who Really Decides Who Dies in Florida: The Jury's Sentencing "Recommendation" and the Trial Court's Sentencing "Imposition"	11
B. Florida Supreme Court Review	22
C. The Roots of *Tedder v. State*: The Tradition of Jury Capital Sentencing in Florida, and the Limited Appellate Review Function of the Florida Supreme Court	24
CONCLUSION	30
APPENDIX A:	
Florida Supreme Court Life Override Decisions on Direct Appeal, 1974-December 1991	1a
APPENDIX B:	
Disposition of the First Sixty-six Florida Homicide Cases on Appeal	12a

TABLE OF CONTENTS—Continued

APPENDIX C: Page

Delaware's 1991 Statute:

1. S.B. 91, Substitute 1 ..... 13a
2. Certificate of Questions of Law, *State v. Cohen*, —— A.2d ——, Nos. IN-90-02-0474 through IN-90-02-0477 (Del. Super. Nov. 6, 1991) 16a

TABLE OF AUTHORITIES

CASES Page

Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), *modified sub nom. on other grounds*, *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987), *rev'd on other grounds*, 489 U.S. 401 (1989) 15
Atkins v. State, 497 So.2d 1200 (Fla. 1986) 28
Baldwin v. Alabama, 472 U.S. 372 (1985) 14
Bates v. State, 465 So.2d 490 (Fla. 1985) 26
Bedford v. State, 16 Fla. L. Week. S665, 1991 WL 201666 (Fla. Oct. 10, 1991) 18
Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 277 (1991) 29
Brown v. State, 565 So.2d 304 (Fla. 1990) 8
Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) 25-28
Buford v. State, 570 So.2d 923 (Fla. 1990) 17
Caldwell v. Mississippi, 472 U.S. 10 (1985) 14
Carter v. State, 560 So.2d 1166 (Fla. 1990) 17
Chambers v. State, 339 So.2d 204 (Fla. 1976) 19
Cheshire v. State, 568 So.2d 908 (Fla. 1990) 5, 17
Clemons v. Mississippi, 110 S. Ct. 1441 (1990) 3, 6, 8, 9
Cochran v. State, 547 So. 2d 928 (Fla. 1989) 14, 18
Cooper v. Dugger, 526 So.2d 900 (Fla. 1988) 17
Cooper v. State, 581 So.2d 49 (Fla. 1991) 20
Craig v. State, 585 So.2d 278 (Fla. 1991) 18
Daugherty v. Dugger, 839 F.2d 1426 (11th Cir.), *cert. denied*, 488 U.S. 871 (1988) 7
Dobbert v. Florida, 432 U.S. 282 (1977) 15
Dolinski v. State, 576 So.2d 271 (Fla. 1991) 17
Douglas v. State, 575 So.2d 165 (Fla. 1991) 17
Downs v. State, 574 So.2d 1095 (Fla. 1991) 17
Eddings v. Oklahoma, 455 U.S. 104 (1982) 4
Edwards v. State, 515 So.2d 86 (Ala. Crim. App. 1987) 14
Elledge v. State, 346 So.2d 998 (Fla. 1977), *cert. denied*, 459 U.S. 981 (1982) 29
Ex Parte Clisby, 456 So.2d 105 (Ala. 1984), *cert. denied*, 470 U.S. 1009 (1985) 14

TABLE OF AUTHORITIES—Continued

	Page
Ex parte Hayes, 518 So.2d 768 (Ala. 1986)	14
Ex Parte Jones, 456 So.2d 380 (Ala. 1984)	13
Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988)	28, 29
Floyd v. State, 486 So.2d 1309 (Ala. Crim. App. 1985), *aff'd sub nom. Ex Parte Floyd*, 486 So.2d 1321 (Ala. 1986)	13
Ford v. State, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980)	29
Ford v. Strickland, 696 F.2d 804 (11th Cir. 1982) (en banc), *cert. denied*, 464 U.S. 865 (1983)	29
Foster v. State, 518 So.2d 901 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988)	7, 20
Freeman v. State, 563 So.2d 73 (Fla. 1990)	29
Furman v. Georgia, 408 U.S. 238 (1972)	24
Gardner v. Florida, 430 U.S. 349 (1977)	25, 26
Garner v. State, 9 So. 835 (Fla. 1891)	24
Godfrey v. Georgia, 446 U.S. 420 (1980)	4
Goode v. State, 365 So.2d 381 (Fla. 1978)	29
Grossman v. State, 525 So.2d 833 (Fla. 1988)	18
Hall v. State, 541 So.2d 1125 (Fla. 1989)	20
Hallman v. State, 560 So.2d 223 (Fla. 1990)	17, 23
Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1000 (1989)	15
Hitchcock v. Dugger, 481 U.S. 393 (1987)	7, 20, 21
Hudson v. State, 538 So.2d 829 (Fla. 1989), *cert. denied*, 110 S. Ct. 212 (1989)	6, 25, 26
Johnson v. Dugger, 520 So.2d 565 (Fla. 1988)	7
Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989)	21
Keech v. State, 15 Fla. 591 (1876)	24
LeDuc v. State, 365 So.2d 149 (Fla. 1978)	19
Lewis v. Jeffers, 110 S. Ct. 3092 (1990)	3, 15
Lewis v. State, 568 So.2d 18 (Fla. 1991)	29
Lindsey v. State, 456 So.2d 383 (Ala. Crim. App. 1983)	14
Lockett v. Ohio, 438 U.S. 586 (1978)	25
Lucas v. State, 417 So.2d 250 (Fla. 1982)	28
Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987)	21
Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989)	15, 21, 22

TABLE OF AUTHORITIES—Continued

	Page
Maynard v. Cartwright, 486 U.S. 386 (1988)	2, 4, 5, 8
McCrae v. State, 582 So.2d 613 (Fla. 1991)	17
McGautha v. California, 402 U.S. 183 (1971)	25
Meeks v. State, 576 So.2d 713 (Fla. 1991)	26
Metzgar v. State, 18 Fla. 482 (1881)	24
Mikenas v. Dugger, 519 So.2d 601 (Fla. 1988)	20, 21
Mills v. Dugger, 574 So.2d 63 (Fla. 1990)	8
Morgan v. State, 515 So.2d 975 (Fla.), *cert. denied*, 486 U.S. 1036 (1987)	7, 21
Morris v. State, 557 So.2d 27 (Fla. 1990)	17
Newton v. State, 21 Fla. 53 (1884)	24
Occhicone v. State, 570 So.2d 902 (Fla. 1990)	8
Parker v. Dugger, 111 S. Ct. 731 (1991)	7, 15, 25
Porter v. Dugger, 559 So.2d 210 (Fla. 1990)	8
Proffitt v. Florida, 428 U.S. 242 (1976)	10, 14, 15
Proffitt v. Wainwright, 688 F.2d 1227 (11th Cir. 1983)	10
Quince v. State, 414 So.2d 185 (Fla.), *cert. denied*, 459 U.S. 895 (1982)	26
Riley v. Wainwright, 517 So.2d 656 (Fla. 1987)	20
Robinson v. State, 16 Fla. L. Week. S107 (Fla. 1991)	8
Rogers v. State, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988)	10
Rose v. State, 425 So.2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983)	11
Savage v. State, 16 Fla. L. Week. S. 647 (Fla. 1991)	18
Schiro v. State, 451 N.E.2d 1047 (Ind.), *cert. denied*, 464 U.S. 1003 (1983)	13
Shell v. Mississippi, 111 S. Ct. 313 (1990)	4, 5
Smalley v. State, 546 So.2d 720 (Fla. 1989)	8
Spaziano v. Florida, 468 U.S. 447 (1984)	14, 15
State v. Cohen, —— A.2d ——, Nos. IN-90-02-0474 through IN-90-02-0477 (Del. Super. Nov. 6, 1991)	13
Stone v. State, 378 So.2d 765 (Fla. 1979)	19
Swan v. State, 322 So.2d 485 (Fla. 1975)	19

TABLE OF AUTHORITIES—Continued

	Page
Tarver v. State, 500 So.2d 1232 (Ala. Crim. App. 1986), *aff'd*, 500 So.2d 1256 (Ala. 1986)	14
Tedder v. State, 322 So.2d 908 (Fla. 1975)	*passim*
Walton v. Arizona, 110 S. Ct. 3047 (1990)	3, 4, 5, 7-11
Waterhouse v. State, 522 So.2d 348 (Fla. 1988)	20
Woodson v. North Carolina, 428 U.S. 280 (1976)	
Wright v. State, 586 So.2d 1024 (Fla. 1991)	18, 21
Ziegler v. Dugger, 524 So.2d 419 (Fla. 1988)	
Ziegler v. State, 580 So.2d 127 (Fla. 1991)	7, 18, 20

STATUTES

49 U.S.C. § 143(c) (1991)	12
Ala. Code § 13A-5-46 (1982)	12, 13
Ariz. Rev. Stat. Ann. § 13-703 (1990)	12
Ark. Stat. Ann. § 5-4-603 (Supp. 1989)	12
Cal. Penal Code § 190.3 (West 1988)	12
Colo. Rev. Stat. § 16-11-103 (1986 & Supp. 1991)	12
Conn. Gen. Stat. §§ 53a-56a (1985)	
Fla. Stat. § 27.702 (1991)	2
Fla. Stat. § 921.141(2) (1991)	11
Fla. Stat. § 921.141(5)(h) (1991)	2
Ga. Code Ann. §§ 17-10-30 to 17-10-32 (1991)	12
Idaho Code § 19-2515 (1987)	12
Ill. Rev. Stat. ch. 38, ¶ 9-1 (1979 & Supp. 1991)	12
Ind. Code § 35-50-2-9 (1985 & Supp. 1991)	12, 13
Ky. Rev. Stat. Ann. § 532.025 (Michie/Bobbs-Merrill 1991)	12
La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1991)	12
Md. Ann. Code art. 27, § 413 (1987 & Supp. 1991)	12
Mont. Code Ann. § 46-18-301 (1990)	12
N.C. Gen. Stat. § 15A-2000 (1983)	12
N.H. Rev. Stat. Ann. § 630:5 (1986 & Supp. 1991)	12
N.J. Stat. Ann. § 2C:11-3 (West 1982 & Supp. 1991)	12
N.M. Stat. Ann. § 31-20A-3 (1991)	12
Neb. Rev. Stat. § 29-2520 (1985)	12
Nev. Rev. Stat. Ann. §§ 175.554, 175.556 (Michie 1986)	12

TABLE OF AUTHORITIES—Continued

	Page
Ohio Rev. Code Ann. § 2929.03 (Baldwin 1987)	12
Okla. Stat. Ann. tit. 21, § 701.11 (West 1983 & Supp. 1991)	12
42 Pa. Cons. Stat. Ann. § 9711(f) (Purdon 1982)	12
S.C. Code Ann. § 16-3-20 (Law. Co-op. 1985 & Supp. 1991)	12
S.D. Codified Laws Ann. § A-27A-4 (1988)	12
Tenn. Code Ann. § 39-13-204 (Supp. 1991)	12
Tex. Crim. Proc. Code Ann. § 37.071 (Vernon 1981 & Supp. 1991)	12
Utah Code Ann. § 76-3-207 (Supp. 1991)	12
Va. Code Ann. § 19-2-264.4 (1991)	12
Wash. Rev. Code Ann. § 10.95.030 (1991)	12
Wyo. Stat. § 6-2-102 (1988)	12

MISCELLANEOUS

W. Bowers, Legal Homicide (1982)	24, 25
Barnard, *Death Penalty*, 13 Nova L. Rev. 908 (1989)	21
Caddell, *Lawmakers React Emotionally: Vile Crimes Trigger Vengeful Action in Legislature*, [Del.] Sunday News Journal, Nov. 10, 1991, at A12, col. 2	13
Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97 (1979)	11, 23, 26
Ehrhardt & Levinson, *Florida's Legislative Response to* Furman, 64 J. Crim. L. & Criminology 10 (1973)	24
Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1 (1980)	11
Hertz & Weisberg, *In Mitigation of the Penalty of Death*, 69 Cal. L. Rev. 317 (1981)	26
Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 Fla. St. U.L. Rev. 31 (1985)	24
Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstances: Narrowing the Class of Death-Eligible Cases Without Making it Smaller*, 13 Stetson L. Rev. 523 (1984)	11

TABLE OF AUTHORITIES—Continued

	Page
Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. Rev. L. & Social Change 887 (1990-1991)	15
Mello, *Rough Justice: Reflections on the Capital Habeas Corpus (Anti)Jurisprudence of Judge Robert S. Vance*, 42 Ala. L. Rev. 1195 (1991)	25
Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C.L. Rev. 283 (1989)	15
Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 Fla. St. U. L. Rev. 923 (1991)	18, 24
Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. & Criminology 913 (1983)	16, 18, 23
Radelet, *Rejecting the Jury*, 18 U.C.D.L. Rev. 1409 (1985)	18
Rosen, *The "Especially Heinous" Aggravating Circumstance: The Standardless Standard*, 64 N.C.L. Rev. 941 (1986)	11
Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 Stetson L. Rev. 263 (1986)	11, 22, 23, 24, 25
Note, *Harmless Error, Cause and Prejudice, Comity and Federalism*, 13 Stetson L. Rev. 83 (1983)	25

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INTEREST OF *AMICUS CURIAE*

Amicus obtained the consent of both parties to file this brief.

The Office of the Capital Collateral Representative of the State of Florida (CCR) was created by the Florida legislature, effective July 1, 1985. This state agency is charged with representing indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in both the state and federal courts after direct

appellate proceedings are concluded and the conviction and sentence have been affirmed. Fla. Stat. § 27.702 (1991) (CCR enabling statute). CCR presently represents 118 condemned prisoners.

As the state agency responsible for representing all indigent Florida prisoners under sentence of death, CCR has acquired experience and expertise that may assist the Court in appreciating the pivotal role of the sentencing jury in Florida's death penalty system.

SUMMARY OF ARGUMENT

The specific questions presented in this case involve Florida's application of its heinousness aggravating circumstance. In considering Florida's treatment of an aggravating circumstance, one must appreciate the central role of the jury in Florida's capital sentencing system. This brief addresses that role.

Florida's capital statute authorizes death as a possible punishment if a homicide is "especially heinous, atrocious or cruel." Fla. Stat. § 921.141(5)(h) (1991). Florida's heinousness aggravating circumstance is facially vague; some limiting construction is necessary to bring the circumstance within the ambit of constitutional acceptability. *Maynard v. Cartwright*, 486 U.S. 386 (1988). From this it follows that the *sentencer* must be informed of such limiting construction. The question then becomes: who is the actual capital sentencer in Florida?

In Florida the jury, not the trial judge or the Florida Supreme Court, is the only real capital sentencer. A jury's sentencing "recommendation" of life imprisonment or death carries great weight—the trial court and the Florida Supreme Court are all but bound by the jury's recommended sentence. *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) (jury recommendations of life imprisonment may be overridden only where "no reasonable person could differ" that death is the appropriate punishment); *cf. Lewis v. Jeffers*, 110 S. Ct. 3092, 3103 (1990)

(state court's finding of an aggravating circumstance is unconstitutionally arbitrary and capricious "if no reasonable sentencer could have so concluded"). The requisite limiting construction of the heinousness aggravating factor thus must be provided to Florida sentencing juries in individual cases. Specifically, judicial involvement—by the trial court or the Florida Supreme Court—cannot cure a jury's tainted recommendation of death.

By exploring the role of the jury in Florida's three-stage capital sentencing system, this brief also speaks to the applicability—or inapplicability—of aspects of *Walton v. Arizona*, 110 S. Ct. 3047 (1990), and *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), to Florida. *Walton* held that in those jurisdictions in which judges are the sole capital sentencers (excluding juries altogether from the death decision), no elaboration of the heinousness circumstance is required at the trial level; trial judges may be presumed to know the limiting gloss on the circumstance articulated by the appellate courts. *Clemons* permits appellate courts to cure jury error by independent judicial resentencing.

Neither of these aspects of *Walton* or *Clemons* applies to Florida. In Florida the jury is the only real sentencer for eighth amendment purposes. Under state law neither the trial court nor the Florida Supreme Court are permitted to act as independent resentencers.

ARGUMENT

BECAUSE THE WORDS OF FLORIDA'S "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE LACK ANY DIRECTIVE CONTENT, A LIMITING CONSTRUCTION OF THE CIRCUMSTANCE MUST BE COMMUNICATED TO THE PENALTY JURY—WHICH FOR EIGHTH AMENDMENT PURPOSES IS THE ONLY REAL CAPITAL SENTENCER IN FLORIDA

In states in which the jury weighs aggravating and mitigating circumstances and returns a verdict as to sentence, to pass constitutional muster an aggravating circumstance must adequately "inform juries what they must find [in order] to impose the death penalty." *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990).

The disjunctive phrase "heinous, atrocious, or cruel" is vacuous and thus unconstitutionally vague, even when redundantly modified by the filler word "especially." *E.g.*, *Shell v. Mississippi*, 111 S. Ct. 313, 314 (1990); *Walton*, 110 S. Ct. at 3056-3058; *Maynard v. Cartwright*, 486 U.S. at 363-364; *see also Eddings v. Oklahoma*, 455 U.S. 104, 109 n.4 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 431-433 (1980).

The unadorned statutory language of Florida's heinousness aggravating circumstance is "unconstitutionally vague on its face," *Walton*, 110 S. Ct. at 3057, because it does not channel the sentencer's discretion as required by the eighth amendment. The unanimous Court observed in *Cartwright*: "To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,'

whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Cartwright*, 486 U.S. at 363-64; *accord Shell v. Mississippi*, 111 S. Ct. 313 (1991) (Mississippi's "heinous, atrocious or cruel" aggravating circumstance unconstitutionally vague on its face).

From *Cartwright* it follows that the *sentencer* must be informed of the limiting construction of the heinousness factor that brings the facially vague aggravating circumstance within the orbit of constitutional acceptability. In distinguishing *Cartwright* from judge sentencing states such as Arizona, the Court in *Walton v. Arizona* noted that in jury sentencing jurisdictions "the jurors [must] be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Walton*, 110 S. Ct. at 3057.

This case therefore presents the question: Who *is* the real capital sentencer in Florida? Is it the jury, which by majority vote renders a "recommendation" of sentence that may be overridden only if no reasonable jury could have reached that sentencing decision? Is it the trial court, which must follow the sentencing jury's recommendation of death or life imprisonment unless no reasonable jury could have done what that jury did? *See Cheshire v. State*, 568 So.2d 908, 911 (Fla. 1990) (trial court's sentencing "role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending a life sentence"). Or is it the Florida Supreme Court, which reviews death sentences for error and proportionality, which in the past half decade has reversed almost 90 percent of those death cases in which the judge overrode the jury's life recommendation, and which has repeatedly said that it does not reweigh aggravating and mitigating circumstances as part of its appellate review

function—in other words, it does not resentence? *See Hudson v. State*, 538 So.2d 829, 831 (Fla. 1989) ("it is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstance").

This Court held in *Clemons v. Mississippi*, 110 S. Ct. 1441, 1446 (1990), that it was permissible, although not required, for a state appellate court, upon the striking of improper aggravating circumstances, to reweigh the remaining aggravating circumstances against the mitigation. The sixth amendment is not violated "where an appellate court invalidates one of two or more aggravating circumstances found by the jury but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence." *Id.*

Such reweighing is proper only if allowed by the state's own law. Each state must "decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been or was improperly presented to the jury." *Id.* at 1447.[1] Mississippi had not decided. The *Clemons* Court vacated the judgment and remanded the case to the state courts, because it was "unclear whether the Mississippi Supreme Court correctly employed" this method. *Id.*

Unlike Mississippi in *Clemons*, Florida has decided its appellate role in capital cases. In deciding who dies in Florida, the jury proceeding is the main event. The *Clemons* analysis may be triggered in either of two places

[1] The *Clemons* Court also held that an appellate court may engage in harmless error analysis. The harmless error aspect of *Clemons* is beyond the scope of this brief.

In any event, the harmless error analysis of *Clemons* has no apparent applicability to Mr. Sochor's case. Because the Florida Supreme Court found no error here, it can hardly be asserted that the court found error harmless; it certainly cannot be maintained that the Florida court articulated any harmlessness finding sufficient to satisfy the requirements of *Clemons*.

in Florida's trifurcated capital sentencing structure: at the trial judge sentence imposition stage, or at the Florida Supreme Court review stage. However, the following subsections will show that the Florida courts have not assumed the role of independent reweigher. In fact, notwithstanding statutory and case law language to the contrary, in Florida the jury is the only real capital sentencer.

Appreciation of the Florida sentencing jury's importance also shows why *Walton v. Arizona* does not apply to Florida. *Walton* held that "the logic [of *Cartwright* and *Godfrey*] has no place in the context of sentencing by a trial judge. Trial judges are presumed[2] to know the law and to apply it in making their decisions." *Walton*, 110 S. Ct. at 3057. Conversely, the logic of *Walton* has no place in the context of sentencing by a jury. Moreover, in those jurisdictions where the judge is the exclusive sentencer, "even if a trial judge fails to apply the narrowing construction" of a vague aggravating circumstance, a state appellate court "may itself determine whether the evidence supports the existence of the ag-

[2] The general presumption mentioned in *Walton* collides in Florida with the presumption that judges follow the jury instructions they give. The Florida Supreme Court has held that if the record does not reflect an affirmative statement to the contrary, "it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed." *Ziegler v. Dugger*, 524 So.2d 901, 902 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *accord Morgan v. State*, 519 So.2d 975, 976 (Fla.), *cert. denied*, 486 U.S. 1036 (1987); *Foster v. State*, 518 So.2d 901, 902 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *Johnson v. Dugger*, 520 So.2d 565, 566 (Fla. 1988); *Daugherty v. Dugger*, 839 F.2d 1426, 1432 (11th Cir.), *cert. denied*, 488 U.S. 871 (1988); *cf. Parker v. Dugger*, 111 S. Ct. 731 (1991) (where jury was instructed as to nonstatutory mitigating factors in accordance with *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Court concluded that the trial judge found nonstatutory mitigating circumstances: "We assume that the judge applied the same standard himself" as he had instructed the jury). Thus, jury instructions that are insufficient under *Cartwright* are significant in the absence of affirmative evidence that the trial court applied a sufficiently narrow construction of the heinousness factor.

gravating circumstance as properly defined," or the court "may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty." *Id.* (citing *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990)).

Language in *Walton* also suggests an interpretation of *Clemons* which makes sense in judge sentencing states and in jury sentencing states where juries are required to articulate the basis of their sentencing decisions, but which makes no sense in Florida. Citing *Clemons*, the Court in *Walton* said that "a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty." *Walton*, 110 S. Ct. at 3057.

The Florida Supreme Court has used a similar methodology to deny *Cartwright*'s relevance in Florida.[3] But the Florida Supreme Court ignores *Walton*'s unstated as-

[3] The Florida Supreme Court attempts to distinguish Florida's statutory scheme from that of Oklahoma—the jurisdiction at issue in *Maynard v. Cartwright*—by asserting that the heinousness aggravating circumstance has been judicially limited in Florida, and, since Florida judges impose sentence, the appellate court can determine whether its limiting construction has been followed. *See Smalley v. State*, 546 So.2d 720 (Fla. 1989). Although Smalley had not preserved his challenge to the jury instruction issue, the court has since relied on that case to reject summarily constitutional challenges to the aggravating circumstance's instructions. *E.g., Robinson v. State*, 16 Fla. L. Week. S107, S110 n.6 (Fla. 1991); *Porter v. Dugger*, 559 So.2d 210, 213 (Fla. 1990) ("*Maynard* does not affect Florida's death sentencing procedures"); *Brown v. State*, 565 So.2d 304, 308 (Fla. 1990) ("We have previously found *Maynard* inapposite to Florida's death penalty sentencing"); *Occhicone v. State*, 570 So.2d 902, 906 (Fla. 1990) ("*Maynard* did not make Florida's penalty instructions on . . . heinous, atrocious, or cruel unconstitutionally vague"); *Mills v. Dugger*, 574 So.2d 63, 65 (Fla. 1990) (*Maynard* is "inapplicable to Florida"). *But see In re Standard Jury Instructions, Criminal Cases, No. 90-1*, 579 So.2d 75 (Fla. 1991) (modification of jury instructions in apparent attempt to comply with *Maynard*).

sumption here: that the trial-level sentencer *did* in fact find the existence of the aggravating circumstance at issue. That assumption holds in judge sentencing states like Arizona, since, as *Walton* itself demonstrates, sentencing judges identify the basis of their decisions. The assumption also holds in most jury sentencing states, which require the jury to articulate the aggravating and mitigating factors it has found to apply in individual cases.

Walton's assumption does not hold in Florida's system of divided sentencing responsibility at the trial level: For while the judge must delineate the aggravating and mitigating circumstances he finds to support a sentence of death, the jury's antecedent recommendation of sentence makes no such specification. Like a jury's general verdict of guilt or innocence, the jury's recommended sentence is an opaque statement that the jury's verdict was life or death. Period. Such an enigmatic verdict by the jury—which is the real capital sentencer in Florida—provides none of the appellate reliability that formed the underpinning of *Walton*.

Florida's system of capital sentencing provides *less* room for retrospective appellate review than that permitted by the purely jury sentencing states (such as Mississippi in *Clemons*) and the purely judge sentencing states (such as Arizona in *Walton*). The basis of a death sentence in Florida is a stew that defies retrospective reconstruction, because one simply does not know what the actual foundation of the jury's sentencing recommendation in fact was. One can speculate about what it might have been, given the evidence, as the trial judge and Florida Supreme Court are forced to speculate. But such speculation was not the rational appellate review process contemplated in *Walton*.

Mr. Sochor's case illustrates the point. Perhaps his jury did not even find the heinousness factor to be present. Perhaps the jury found the circumstance present, but the jury did so only due to a misunderstanding about the constitutionally permissible breadth of the factor. Perhaps the jury found the circumstance present but

gave it little weight. Perhaps heinousness was the only aggravating circumstance given much weight by the jury. Perhaps the overbreadth of the heinousness factor tipped the jury's sentencing balance in favor of death. Perhaps the trial judge based his death sentence on a reasonable—but factually wrong—belief that the jury's death recommendation was predicated on a finding that the heinousness factor was present in the case.[4]

All the Florida Supreme Court knows is that the jury may have found the heinousness factor present and that the trial judge did find it present. The appellate court cannot know whether the jury *did* in fact find the factor present.[5] The Florida Supreme Court's review merely

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[4] The impossibility of divining what aggravating and mitigating circumstances the jury actually finds, as well as the mysteries of the process of guessing what the jury actually did with whatever aggravating and mitigating circumstances the jury actually found, are suggested by *Rogers v. State*, 511 So.2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). *Rogers* was concerned with the proper consideration of mitigation, but the case's lessons apply equally to the aggravation side of the sentencing equation. In analyzing mitigating evidence, the

> trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, *i.e.*, factors that, in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. The reasoning process demanded by *Rogers* cannot be reconstructed retrospectively from a jury's bare verdict of death or life imprisonment.

[5] Further, the Florida Supreme Court has not in fact placed a sufficient narrowing gloss on the heinousness factor. Though it once may have appeared that the Florida courts had adopted such a construction, *see Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976); *Proffitt v. Wainwright*, 688 F.2d 1227, 1263 (11th Cir. 1983), in fact the circumstances has become a universal catch-all. "It is difficult to imagine a murder to which the circumstances could not be applied by citing some case. . . ." Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 Stetson L. Rev. 263, 318 (1986). Full discussion of the matter is beyond the scope of this brief, but *see generally* Rosen, *The "Especially Heinous" Aggravating Circumstance: The Standardless Standard*, 64 N.C.L. Rev. 941, 972-75 (1986); Skene, *supra*, at 317-321; Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 127-28 (1979); Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller*, 13 Stetson L. Rev. 523 (1984). Commentors universally criticize heinousness aggravating circumstances as vague, overbroad, and meaningless. *E.g.*, Rosen, *supra*, at 944 (collecting examples).

ascertains whether it would have been an abuse of discretion for the jury to have found the factor—*if* the jury had found it in the first place.

The inquiry under *Walton*, as under *Clemons*, turns ultimately on what the jury's sentencing function is in Florida's death sentencing process. The remainder of this brief will demonstrate that for eighth amendment purposes, Florida should be treated as a jury sentencing jurisdiction, because the jury is the only real capital sentencer in Florida.

A. Who Really Decides Who Dies in Florida: The Jury's Sentencing "Recommendation" and the Trial Court's Sentencing "Imposition"

Florida's capital statute provides: "Notwithstanding the recommendation of a majority [6] of the jury, the court, after weighing the aggravating and mitigating circum-

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[6] Although Florida's capital statute speaks in terms of a recommendation by a "majority" of the jury, Fla. Stat. § 921.141(2) (1991), a split vote of 6-6 is treated as a recommendation of life imprisonment. *Patten v. State*, 467 So.2d 976, 980 (Fla. 1985); *Rose v. State*, 425 So.2d 521, 525 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983). A 1980 survey found that 23 states explicitly required jury unanimity to impose death, and that most of the remaining capital punishment states with jury sentencing did so by implication. Gillers, *Deciding Who Does*, 129 U. Pa. L. Rev. 1, 102-19 (1980).

stances," enters a sentence of life imprisonment or death. Fla. Stat. § 921.141(3) (1991). Unlike judge sentencing states such as Arizona [7]—and even unlike Alabama and

[7] In Arizona, Idaho, Montana, and Nebraska, the court alone imposes sentence. Ariz. Rev. Stat. Ann. § 13-703 (1990); Idaho Code § 19-2515 (1987); Mont. Code Ann. § 46-18-301 (1990); Neb. Rev. Stat. § 29-2520 (1985). At least 27 jurisdictions with presumptively valid capital statutes allow a death sentence only if the jury votes for death, unless the defendant has requested sentencing by the court. 49 U.S.C. § 1473(c) (1988); Ark. Stat. Ann. § 5-4-603 (Supp. 1989); Cal. Penal Code § 190.3 (West 1988); Colo. Rev. Stat. § 16-11-103 (1986 & Supp. 1991); Conn. Gen. Stat. §§ 53a-56a (1985); Ga. Code Ann. §§ 17-10-30 to 17-10-32 (1991); Ill. Rev. Stat. ch. 38, ¶ 9-1 (1979 & Supp. 1991); Ky. Rev. Stat. Ann. § 432.025 (Michie/Bobbs-Merrill 1991); La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1991); Md. Ann. Code art. 27, § 413 (1987 & Supp. 1991); N.H. Rev. Stat. Ann. § 630.5 (1986 & Supp. 1991); N.J. Stat. Ann. § 2C:11-3 (West 1982 & Supp. 1991); N.M. Stat. Ann. § 31-20A-3 (1991); N.C. Gen. Stat. § 15A-2000 (1983); Ohio Rev. Code Ann. § 2929.03 (Baldwin 1987); Okla. Stat. Ann. tit. 21, § 701.11 (West 1983 & Supp. 1991); 42 Pa. Cons. Stat. Ann. § 9711(f) (Purdon 1982); S.C. Code Ann. § 16-3-20 (Law. Co-op. 1985 & Supp. 1991); S.D. Codified Laws Ann. § A-27A-4 (1988); Tenn. Code Ann. § 39-13-204 (Supp. 1991); Tex. Crim. Proc. Code Ann. § 37.071 (Vernon 1981 & Supp. 1991); Utah Code Ann. § 76-3-207 (Supp. 1991); Va. Code Ann. § 19.2-264.4 (1991); Wash. Rev. Code Ann. § 10.95.030 (1991); Wyo. Stat. § 6-2-102 (1988). In Nevada the jury is given responsibility for imposing the sentence in capital cases; if the jury cannot agree, a panel of three judges may impose sentence. Nev. Rev. Stat. Ann. §§ 175.554, 175.556 (Michie 1986).

Only in Florida, Alabama, Indiana, and (as of November 4, 1991) Delaware, are jury sentencing verdicts of life imprisonment subject to override. Ala. Code § 13A-5-46 (1982); Fla. Stat. § 921.141(3) (1991); Ind. Code § 35-50-2-9 (1985 & Supp. 1991).

In November 1991, Delaware, reportedly reacting emotionally to a highly publicized case, removed the sentencing authority of capital juries and placed it in the hands of sentencing judges. The juries' function under the revised statute is to make findings regarding the existence of aggravating circumstances and to state whether the aggravating factors outweigh those in mitigation. The revisions to the statute reportedly were precipitated by the "failure" of a capital jury to return death sentences against four defendants in

Indiana, the other two longstanding jury override states (where the jury's recommended sentence really is not more than an advisory opinion of marginal importance) [8]—in

an armed-robbery case in which two armored car guards were shot and killed. Caddell, *Lawmakers React Emotionally: Vile Crimes Trigger Vengeful Action in Legislature*, [Del.] Sunday News Journal, Nov. 10, 1991, at A12, col. 2 ("In the Brooks case last month, the jury's inability to reach a unanimous decision on the death penalty resulted in the Legislature passing a new law, which takes the final decision away from the jury and gives it to the trial judge"). The revisions were adopted by the Delaware General Assembly in one day the same week the penalty verdicts were returned in that robbery case, with almost no reflection and little debate by legislators except expressions of "outrage" and "disgust" at the sentencing outcome in that case. The legislation incorporating the revisions was Senate Substitute 1 for Senate Bill 79. *See* Appendix C. The governor approved the revisions on November 4, 1991. All Delaware capital trials have been stayed pending resolution by the Delaware Supreme Court of ten certified questions relating to revisions of the death penalty statute, certified to that court by the Superior Court trial judge in *State v. Cohen*, —— A.2d ——, Nos. IN-90-02-0474 through IN-90-02-0477 (Del. Super. Nov. 6, 1991). *See* Appendix C.

[8] Ala. Code § 13A-5-47(c) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court"); Ind. Code § 35-20-2-9(c) ("The court is not bound by the jury's recommendation"); *Floyd v. State*, 486 So.2d 1309, 1316 (Ala. Crim. App. 1985), *aff'd sub nom. Ex Parte Floyd*, 486 So.2d 1321, 1323 (Ala. 1986); *Schiro v. State*, 451 N.E. 2d 1047, 1053 (Ind.), *cert. denied*, 464 U.S. 1003 (1983). In neither Alabama nor Indiana does the appellate court review the trial court's jury override sentencing in light of the jury's recommendation. The focus of appellate review in those states is on the propriety of the trial judge's decision, with the jury's recommendation viewed, at best, as a factor to be "considered."

Some Alabama and Indiana cases have rejected the jury recommendation of sentence as an especially significant factor in appellate review. *E.g.*, *Ex Parte Jones*, 456 So.2d 380, 382 (Ala. 1984) ("It appears to this Court, however, that the United States Supreme Court . . . [did not find Florida's rule requiring great deference to jury recommendations of life imprisonment] to be a general constitutional requirement under a statutory scheme similar to that of Florida"); *Schiro*, 451 N.E.2d at 1058 ("While we agree that a jury plays a very important and necessary role in our ju-

Florida the jury's recommendation of life or death carries great weight.

The Florida sentencing jury's role is central to the decision to impose life imprisonment or death. Jury recommendations of life imprisonment may be overridden by the judge only in those rare instances where "virtually no reasonable person could differ" that death should be imposed in the case. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); *see also Cochran v. State*, 547 So. 2d 928, 933 (Fla. 1989). This Court in *Proffitt v. Florida*, 428 U.S. 242, 249 (1976), relied upon and quoted from *Tedder* in upholding the abstract constitutionality of Florida's capital statute as a whole, incidently including the jury override. The Court also acknowledged the *Tedder* standard in *Spaziano v. Florida*, 468 U.S. 447 (1984), in specifically upholding the facial constitutionality of the override itself.[9] Most re-

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dicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty"). *See also Baldwin v. Alabama*, 472 U.S. 372 (1985). Under Alabama law, the sentencing judge must consider the jury's sentencing recommendation but is free to override it subject to an abuse of discretion standard of review. In *Ex Parte Clisby*, the Alabama Supreme Court stated: "It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentencing, is required to, and in this case did, make written findings." 456 So.2d 105, 109 (Ala. 1984), *cert. denied*, 470 U.S. 1009 (1985). This approach was followed in *Edwards v. State*, 515 So.2d 86, 89 (Ala. Crim. App. 1987), where the court noted that "the trial judge is, therefore, free to consider such cases on an individual basis in order to determine whether the aggravating circumstances outweigh the mitigating circumstances and vice versa." The court in *Lindsey v. State*, 456 So.2d 383, 390 (Ala. Crim. App. 1983), held that the trial judge was free to disregard a jury's recommendation. *See also, e.g.; Ex parte Hayes*, 518 So.2d 768 (Ala. 1986); *Tarver v. State*, 500 So.2d 1232 (Ala. Crim. App. 1986), *aff'd*, 500 So.2d 1256 (Ala. 1986).

Delaware's 1991 override statute has not yet generated any interpretive case law.

[9] A year after *Spaziano* was decided, the Court held in *Caldwell v. Mississippi*, 472 U.S. 310 (1985), that capital sentencers may not be misled about the importance of their decisions. Florida's capital

cently in *Parker v. Dugger*, in invalidating the override as applied, the Court reaffirmed its consistent and accurate understanding that "under Florida law, a sentencing judge is to override a jury's recommendation of life imprisonment only when 'virtually no reasonable person could differ.'" *Parker v. Dugger*, 111 S. Ct. 731, 735 (1991) (quoting *Tedder v. State*); *id.* at 735 (again citing *Tedder* for same proposition); *id.* at 737 (same). "We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the 'crucial protection' afforded by such review in jury override cases." *Parker*, 111 S. Ct. at 739 (quoting *Dobbert v. Florida*, 432 U.S. 282, 295 (1977) and citing *Proffit v. Florida*, 428 U.S. 242, 253 (1976) and *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)). *Cf. Lewis v. Jeffers*, 110 S. Ct. 3092, 3103 (1990) (state court's finding of an aggravating circumstance is arbitrary and capricious if "no reasonable sentencer could have so concluded").

"That the [Florida Supreme Court] meant what it said in *Tedder* is amply demonstrated by the dozens of cases in which it has applied the *Tedder* standard to reverse a trial judge's attempt to override a jury recommendation of life." *Mann v. Dugger*, 844 F.2d 1446, 1451 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989). The following table shows that over the decade-and-a-half life-

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jury instructions as applied may well fall afoul of *Caldwell*. *See Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1071 (1989); *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), *modified sub nom. on other grounds, Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987), *rev'd on other grounds*, 489 U.S. 401 (1989); *compare Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1000 (1989); *see also* Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C.L. Rev. 283 (1989); Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. Rev. L. & Social Change 887, 908-910 (1990-1991).

span of Florida's 1972 capital statute, life "recommendation" override cases have been reversed in seventy-five percent of the cases, reversals usually based entirely on the override issue itself.[10]

Year	Direct Appeal Decisions in Life Recommendation Cases	Number Reversed	Percentage
1991	11	10	91%
1990	5	5	100%
1989	6	5	83%
1988	10	9	90%
1987	6	5	83%
1986	8	7	87%
1985	7	3	43%
1984	11	4	36%
1983	12	9	75%
1982	9	6	66%
1981	16	11	67%
1980	4	4	100%
1979	3	2	66%
1978	3	2	66%
1977	4	3	75%
1976	6	5	83%
1975	5	3	60%
1974	1	1	100%
TOTAL	127	94	75%

See Appendix A (providing citation support for Table 1).

These figures become even more significant when sorted into three time frames. From 1974 (when the first override cases reached the Florida Supreme Court) through December 1983, only seventeen of sixty-three life overrides

[10] The vast majority of these cases were reversed, and life sentences mandated, pursuant to application of *Tedder*. *See* Appendix A. This listing includes some override cases where the condemned appellant prevailed on grounds other than the override itself. *See* Appendix A. These cases ought to be included in the tabulation, because "the strongest predictor of a favorable Florida Supreme Court decision [to the death row inmate] is a jury recommendation of life imprisonment rather than death." Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. & Criminology 913, 923 (1983). *See* discussion *infra*, § B.

were affirmed (28%); forty-five were reversed (72%). In 1984 and 1985, affirmances by the Florida Supreme Court became significantly more frequent: eleven of eighteen (61%); only seven were reversed (39%). But from 1986 through December 1991, only five of forty-six (11.1%) were affirmed; forty-one were reversed (89.9%).

Over the past half decade, in other words, cases with jury life recommendation overrides were reversed almost ninety percent of the time. Judge overrides of life recommendations survived appellate review in a paltry 11.1 percent of the cases.[11]

[11] The cases decided during the past two years show the robustness of *Tedder*. In 1990, the Florida Supreme Court granted relief in all five jury override cases it decided on appeal. *See Morris v. State*, 557 So.2d 27 (Fla. 1990) (trial court found one aggravating circumstance and no mitigating factors; override reversed; life sentence mandated); *Hallman v. State*, 560 So.2d 223 (Fla. 1990) (trial court found six aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (trial court found five aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Cheshire v. State*, 568 So.2d 908 (Fla. 1990) (trial court found three aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Buford v. State*, 570 So.2d 923 (Fla. 1990) (trial court found two aggravating factors and one mitigating circumstance; override reversed; life sentence mandated).

In 1991, the court granted relief in ten of the eleven jury override cases it considered on direct appeal. *See Dolinski v. State*, 576 So.2d 271 (Fla. 1991) (trial court found three aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Douglas v. State*, 575 So.2d 165 (Fla. 1991) (trial court found two aggravating and two mitigating circumstances; override reversed; life sentence mandate); *Hegwood v. State*, 575 So.2d 170 (Fla. 1991) (trial court found six aggravating factors and one mitigating circumstance; override reversed; life sentence mandated); *Downs v. State*, 574 So.2d 1095 (Fla. 1991) (trial court found four aggravating and no mitigating factors; override reversed, life sentence mandated); *McCrae v. State*, 582 So.2d 613 (Fla. 1991) (trial court found four aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Cooper v. State*, 581 So.2d 49 (Fla. 1991) (trial court found four aggravating and two mitigating

The Florida Supreme Court recognizes that the *Tedder* standard is rigorous. Citing figures of reversals based solely on the override issue itself, the court in *Cochran v. State*, 547 So. 2d 928, 933 (Fla. 1990), reiterated its earlier statements that "[d]uring 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent." By contrast, "during 1986 and 1987 we have affirmed overrides in only two of eleven cases, less than twenty percent." *Id.* (citing *Grossman v. State*, 525 So.2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring)). "This current reversal rate of over eighty percent is a *strong indicator to [trial] judges that they should place less reliance on their independent weighing of aggravation and mitigation.*" *Id.* (emphasis added).[12]

Tedder applies regardless of whether the jury recommends death or life imprisonment. Like a jury recommendation of life, "a jury recommendation of death should be given great weight." *Grossman v. State*, 525 So.2d 833,

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circumstances; override reversed; life sentence mandated); *Bedford v. State*, 16 Fla. L. Week. S665, 1991 WL 201666 (Fla. Oct. 10, 1991) (trial court found three aggravating and no mitigating circumstances; override reversed; life sentence mandated); *Craig v. State*, 585 So.2d 278 (Fla. 1991) (trial court found two aggravating and no mitigating circumstances; override reversed, life sentence mandated); *Savage v. State*, 16 Fla. L. Week. S.647 (Fla. 1991) (decision does not reflect what trial court found; override reversed; life sentence mandated); *Wright v. State*, 586 So.2d 1024 (Fla. 1991) (trial court found four aggravating and four mitigating factors; override reversed; life sentence mandated); *Ziegler v. State*, 580 So.2d 127 (Fla. 1991) (defendant murdered a series of people as part of a carefully premediated plan to obtain insurance proceeds; trial court found four aggravating and one mitigating circumstance; override affirmed).

[12] *See also* Radelet, *Rejecting the Jury*, 18 U.C.D.L. Rev. 1409, 1412 (1985); Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. & Criminology 913, 923 (1983); Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 Fla. St. U. L. Rev. 923 (1991).

840n.1 (Fla. 1988).[13] For example, the Florida Supreme Court applied the *Tedder* standard to a death recommendation in *LeDuc v. State*, 365 So.2d 149 (Fla. 1978). LeDuc had pleaded guilty to a murder, and the prosecutor, carrying out a plea bargain, argued for a life sentence (after briefly listing the applicable aggravating circumstances and noting that no evidence of mitigation had been introduced). The jury was unanimous in recommending death; the supreme court, citing *Tedder*, said the recommendation of a jury "should not be disturbed . . . unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." *Id.* at 151. The same indirect application of *Tedder* happened in *Stone v. State*, 378 So.2d 765 (Fla. 1979), when the court performed proportionality review and compared Stone's case with *Swan v. State*, 322 So.2d 485 (Fla. 1975). "Swan's jury recommended mercy while Stone's recommended death, and the jury recommendation is entitled to great weight," the court declared. *Stone*, 278 So.2d at 772. Thus, the death sentence in *Swan* was reversed; in *Stone* it was affirmed. *Tedder* explains the difference.

The importance of the sentencing jury's death recommendation is underscored by the behavior of the Florida Supreme Court when it finds error in jury proceedings that result in death recommendations. As the Eleventh Circuit en banc court observed:

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[13] Justice England, who wrote *Tedder*, suggested later in a concurrence that the jurisprudential basis of the *Tedder* rule applied to death as well as life recommendations. "[T]he judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason," he wrote in *Chambers. v State*, 339 So.2d 204, 208 (Fla. 1976) (England, J., concurring). "Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed . . . ." *Id.*

> [T]he [Florida Supreme Court] will vacate the [death] sentence and order resentencing before a new jury if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, or was subject to improper argument by the prosecutor. The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation . . . . Finally, we note that the Supreme Court of Florida has ordered resentencing in cases where the trial court excused a prospective juror in violation of *Witherspoon v. Illinois*.

Mann v. Dugger, 844 F.2d at 1452-53 (footnote and citations omitted).

After this Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Florida Supreme Court reaffirmed the importance of the sentencing jury's verdict in Florida's trifurcated capital sentencing system. In the wake of *Hitchcock*, the Florida Supreme Court said that "if the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, the entire sentencing process necessarily is tainted by the procedure." *Riley v. Wainwright*, 517 So.2d 656, 659 (Fla. 1987); *accord Hall v. State*, 541 So.2d 1125, 1128 (Fla. 1989) (It "is of no significance that the trial judge stated that he would have imposed the death penalty in any event [absent error in jury proceeding]. The proper standard is whether a jury recommending life imprisonment would have had a reasonable basis for that recommendation").[14]

[14] *See also Waterhouse v. State*, 522 So.2d, 348, 354 (Fla. 1988); *Cooper v. Dugger*, 526 So.2d 900 (Fla. 1988); *Foster v. State*, 518 So.2d 901 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988); *Mikenas v. Dugger*, 519 So.2d 601 (Fla. 1988); *Zeigler v. Dugger*, 524 So.2d 419 (Fla. 1988); *Morgan v. State*, 515 So.2d 975 (Fla. 1987), *cert. denied*, 486 U.S. 1036 (1988); *Jones v. Dugger*, 867 F.2d 1277, 1280 (11th Cir. 1989); *Magill v. Dugger*, 824 F.2d 879, 893 (11th Cir. 1987).

That judge resentencing cannot cure jury error is illustrated by *Mikenas v. Dugger*, 519 So.2d 601 (Fla. 1988). Mikenas' jury recommended death, and the court imposed death. The Florida Supreme Court ordered a judge-only resentencing, because the trial court improperly considered non-statutory aggravating circumstances. Following the reimposed death sentence, the Florida Supreme Court found that the sentence violated *Hitchcock v. Dugger*, and that such jury error required a new jury sentencing proceeding.

Tedder not only "lives," as one writer put it, *see* Barnard, *Death Penalty*, 13 Nova L. Rev. 908, 970 (1989); in Florida *Tedder* thrives. Four months ago, the Florida Supreme Court held that double jeopardy barred again subjecting a defendant to a death sentence, when the jury in the initial trial recommended life imprisonment. *Wright v. State*, 586 So.2d 1024 (Fla. 1991). Citing the state constitution's prohibition against double jeopardy, the court explained that "when it is determined on appeal that the trial court should have accepted a jury's recommendation of life imprisonment pursuant to *Tedder*, the defendant must be deemed acquitted of the death penalty for double jeopardy purposes." *Id.* at 1032.

The Supreme Court of Florida thus acknowledges that a jury recommendation of death or life imprisonment has a "*sui generis* impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside trial level sentencing error." *Mann*, 844 F.2d at 1453. It is not surprising that the Florida Supreme Court would make this kind of normative judgment. "A jury recommendation is, after all, the final stage in an elaborate process whereby the community expresses its judgment regarding the appropriateness of a death sentence." *Id.* at 1454. The process "be-

gins with the legislature, which broadly defines the class of cases for which capital punishment is appropriate. Then, in the particular case, the prosecutor—who is electorally accountable to the community—makes the decision whether to request the death penalty. Finally, the jury, traditionally depicted as the conscience of the community, makes a judgment about the appropriateness of death in light of aggravating and mitigating circumstances. Thus, by the time the case comes before the judge for the actual imposition of sentence, it has already been filtered through three levels of community sentiment, each level less porous than the preceding one." *Id.*

B. Florida Supreme Court Review

"Just what *does* the [Florida Supreme Court] do when it reviews a [capital] case?" Skene, *supra*, at 291 (emphasis in original). The answer is somethting of a "mystery," *id.*, but two things are fairly free of doubt. First, the scope of the Florida Supreme Court's review, like the discretion of the trial court to impose sentence, is cabined by the jury's recommended sentence. Second, this deference to the jury is unsurprising notwithstanding the misleading characterization of its verdict as a "recommendation," because the Florida Supreme Court simply "reviews" death sentences for error and proportionality. The appellate court does not itself resentence, since it does not reweigh the evidence of aggravating and mitigating circumstances.

The importance of the jury's sentencing recommendation does not end with the trial judge; it carries over into the Florida Supreme Court's review of capital cases. Students of the Florida Supreme Court's death penalty jurisprudence have documented that the jury recommendation is the single best predictor of direct appeal outcomes. Here, as at the trial level, the jury's sentencing verdict is the main event.

George Dix, examining the Florida Supreme Court's disposition of its first 66 homicide cases involving death

sentences, concluded in 1979 that "the relation between the advisory jury and the sentencing judge is crucial to an understanding of the Florida appellate process." Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 124 (1979). Although "the Florida Supreme Court has been far more willing to reduce death penalties than its Georgia counterpart," this willingness "reflects a requirement of extraordinary justification for a trial judge to override a jury's advisory verdict favoring leniency. In only one case has the court reduced a death penalty when both the trial judge and jury agreed that death was the most appropriate penalty, and in that case the decision of the trial court rested in large part upon an improper perception of the aggravating nature of one of the defendant's actions." *Id.* at 141. Professor Dix's graphic illustration of the point is reproduced at Appendix B of this brief.

Similarly, Michael Radelet and Margaret Vandiver studied all reported Florida Supreme Court decisions in death penalty cases during the period from January 1, 1973 to December 31, 1981, and concluded that "the strongest predictor of a favorable Florida Supreme Court decision [to the prisoner] is a jury recommendation of life imprisonment rather than death." Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. Crim. L. & Criminology 913, 923 (1983); *id.* at 919-920; *see also* Skene, *supra*, at 198 ("The jury recommendation appears to determine the degree of deference the supreme court gives to trial judges' findings on aggravating and mitigating circumstances").[15]

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[15] Skene elaborated: "If the jury recommended death, the supreme court usually . . . defers to the trial judge's findings. If the jury recommended life, however, the court becomes more willing to second-guess the judge's findings; for the most part, trial judges' findings that mitigating circumstances exist or are of little weight are aggressively reviewed." Skene, *supra*, at 298. Skene's analysis is illustrated by *Hallman v. State*, 560 So.2d 223, 227 (Fla. 1990), where the court reversed an override of a jury's life recommendation because the jury could reasonably have concluded that the aggravating factors found by the trial judge were "entitled to little weight."

C. The Roots of *Tedder v. State*: The Tradition of Jury Capital Sentencing in Florida, and the Limited Appellate Review Function of the Florida Supreme Court

The pervasive influence of the jury's sentencing "recommendation" shows that the *Tedder* standard is no technicality. *Tedder* draws from a century-old tradition of jury capital sentencing in Florida. The override was enacted in a reasonable attempt to comply with the commands of *Furman v. Georgia*, 408 U.S. 238 (1972).[16] For the century before *Furman*—1872 to 1972—a Florida jury's verdict for mercy was final. By 1884 the Florida Supreme Court was able to state that "the law is positive. If a majority of the jurors recommend to mercy, by whatever motives they may be activated (and those motives are not circumscribed), the court is bound to heed their verdicts and pronounce sentence accordingly." *Newton v. State*, 21 Fla. 53, 101 (1884).[17]

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[16] *Ehrhardt & Levinson, Florida's Legislative Response* to Furman, 64 J. Crim. L. & Criminology 10 (1973); Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 Fla. St. U.L. Rev. 31 (1985).

[17] *See also Garner v. State*, 9 So. 835, 847 (Fla. 1891); *Keech v. State*, 15 Fla. 591, 591 (1876) (syllabus citing the "Act of February 27, 1872, ch. 1887" for the proposition that "in capital cases, if a majority of the jury recommended the accused to the mercy of the court, the sentence must be imprisonment for life"); *id.* at 407 (same); *Metzgar v. State*, 18 Fla. 482, 483 (1881) (same); Skene, *supra*, at 301 ("For one hundred years, a jury's majority vote for life in a capital case was binding"); *cf.* W. BOWERS, LEGAL HOMICIDE 10-11 (1982) (identifying 1872 as the year Florida moved from mandatory to discretionary capital sentencing); Mello, *supra*, 18 Fla. St. U. L. Rev., at 962-970 (discussing the status of Florida's capital sentencing law as of 1845, when the state's first constitution became effective). "It is no wonder, in light of the tradition of jury sentencing, that the [Florida Supreme Court] has proclaimed great deference to jury recommendations of life." Skene, *supra*, at 302.

Florida's history of jury capital sentencing is typical. Between the mid-nineteenth century and *Furman* in 1972, United States

The definitive role of the jury's sentencing recommendation makes sense given the Florida Supreme Court's limited role in reviewing death sentences. As this Court noted in *Parker v. Dugger*, "the Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances." 110 S. Ct. at 738 (citing *Hudson v. State*, 538 So.2d 829, 831 (Fla. 1989) and *Brown v. Wainwright*, 392 So.2d 1327 (Fla. (1981)).

The Florida Supreme Court's most extensive description of its review function in capital cases occurred in *Brown v. Wainwright*, and the *Brown* formulation "now appears to be the prevailing description of the Supreme Court's role." Skene, *supra*, at 291. The question presented in *Brown* was whether the Florida Supreme Court's consideration of nonrecord material when reviewing capital sentences "led to a rash of constitutional violations ranging from a denial of due process . . . to a pervasive violation of *Gardner v. Florida*, 430 U.S. 349 (1977)." *See Brown*, 392 So.2d at 1330-1331.[18] *Brown* was brought as

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legislatures have decided with near unanimity that no person should be sentenced to die without the consent of his peers. In 1971 Justice Harlan observed that "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every United States jurisdiction has at some time authorized jury sentencing in capital cases." *McGautha v. California*, 402 U.S. 183, 200 n.11 (1971). The plurality in *Woodson v. North Carolina* traced this history. 428 U.S. 280, 291-92 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 598-99 (1978); W. BOWERS, *supra*, at 7-9.

[18] On the *Brown* issue generally, *see* Skene, *supra*, at 286-7; Note, *Harmless Error, Cause and Prejudice, Comity and Federalism*, 13 Stetson L. Rev. 83 (1983); Mello, *Rough Justice: Reflections on the Capital Habeas Corpus (Anti)Jurisprudence of Judge Robert S. Vance*, in *Symposium*: *Judge Vance*, 42 Ala. L. Rev. 1195, 1223-1228 (1991).

The Florida Supreme Court's curious treatment of its prior practices and cases did not begin or end with *Brown*. That court's treatment of mitigating circumstances in the years prior to *Lockett v. Ohio*, 438 U.S. 586 (1978), is an example cited by commentators, as well as by a sitting Justice of the Florida Supreme Court. *E.g.*,

a class action on behalf of a class of all 123 inmates then on Florida's death row.

These 123 inmates challenged the Florida Supreme Court's secret, *ex parte* practice of "requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal." *Id.* at 1330. The non-record material at issue "allegedly includ[ed] pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel." *Id.*

The Florida Supreme Court rejected the constitutional challenge in *Brown*, reasoning that while "*Gardner* stands for the proposition that a sentence of death may not be imposed . . . on non-record, unchallengeable information," no error occurred because "*we do not 'impose' sentences* in capital cases." *Brown*, 322 So.2d at 1332. (emphasis added.) The Florida Supreme Court's holding in *Brown* that it was not a sentencer was the linchpin of its decision rejecting the *Gardner* claim. Significantly, had the Florida Supreme Court been acting as a sentencer, the class in *Brown*, dozens of whom remain on death row without any intervening resentencing, would be entitled to relief.

Meeks v. State, 576 So.2d 713, 718-19 (Fla. 1991) (Kogan, J., concurring); Hertz & Weisberg, *In Mitigation of the Penalty of Death*, 69 Cal. L. Rev. 317, 351 (1981) (Florida construed its capital statute "in such a way as to evade the effect of *Lockett* . . . [and] ignored statutory language and earlier case law to construe apparently exclusive statutory rosters as nonexclusive and [has] applied its new construction [] retroactively to validate sentences imposed under the previous, unconstitutional constructions"); *id.* at 356 (the retrospective construction of Florida common law is "so lacking in 'fair and substantial support' in state law as to be [a] subterfuge[] or pretext[] for evading a federal claim"); *id.* at 358 (same); Dix, *supra*, at 138 (criticizing the Florida Supreme Court for its "unwillingness" to acknowledge that its prior decisions "were wrongly decided and to rectify the error").

Twenty members of the *Brown* class have since been executed.[19]

The Florida Supreme Court in *Brown* explained its role in reviewing death sentences on direct appeal. The court described its review as having "two discrete functions." *Id.* at 1331. Initially, the court determines "if the jury and judge acted with procedural rectitude in applying [the death penalty statute] and [Florida] case law." *Id.* The court's second review function "is to ensure proportionality among death sentences which have been approved statewide."

The Florida Supreme Court held that its "role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.'" *Id.* at 1331. The court did not mince words:

> *Neither of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances.* Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings . . . are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, *the trial court's sentence must be*

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[19] Carl Shriner, Daniel Thomas, Aubry Adams, David Funchess, James Raulerson, Raymond Clark, Marvin Francois, James Adams, Anthony Antone, Theodore Bundy, Arthur Goode, Timothy Palmes, Robert Sullivan, Buford White, Jesse Tafero, Willie Darden, Ronald Straight, Johnny Witt, Ernest Dobbert, and David Washington. All were members of the *Brown* class. *See Brown v. Wainwright*, 392 So.2d 1327 (Fla.) (style of case listing class members), *cert. denied*, 454 U.S. 1000 (1981). All have since been executed. *See NAACP*, Legal Defense and Educ. Fund, Inc., Death Row, U.S.A. (April 24, 1991) (unpublished compilation) (listing all executions subsequent to *Furman v. Georgia*, 408 U.S. 248 (1972)).

sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

Id. (emphasis added) (footnote omitted).

The Florida Supreme Court has not retreated from *Brown*; to the contrary, recent decisions of that court reaffirm that the court's role in reviewing death sentences is that of a reviewer and not that of a sentencer or resentencer. In 1989 the court reiterated that its "function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate . . . . [and] [*i*]*t is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances.*" *Hudson v. State*, 538 So.2d 829, 831 (Fla.) (emphasis added) (citations omitted), *cert. denied*, 110 S. Ct. 212 (1989). *Hudson* reemphasized the Florida Supreme Court's position that it is precluded as a matter of state law from reevaluating the trial court record in order to substitute its own considered sentence for that of the sentencer. As the court said, "[w]e must . . . decline Hudson's invitation to reweigh the mitigating evidence and place greater emphasis on it than the trial court did." *Id.*[20]

[20] *See also, e.g., Quince v. State*, 414 So.2d 185, 187 (Fla.), *cert. denied*, 459 U.S. 895 (1982) ("Neither of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating or mitigating circumstances"); *Lucas v. State*, 417 So.2d 250, 251 (Fla. 1982) ("This Court's role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition'. . . . [T]he trial court's sentence must be sustained even though had we been triers of fact, we might have reached a different result in an independent evaluation"); *Bates v. State*, 465 So.2d 490, 493 (Fla. 1985) ("As a reviewing Court, we do not reweigh the evidence"); *Atkins v. State*, 497 So.2d 1200, 1203 (Fla. 1986) ("It is not this court's function to engage in a [illegible]eral *de novo* reweighing of the circumstances. Rather, we are to examine the record to ensure that the findings relied upon are supported by the evidence"); *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla. 1988) ("we must emphasize that our [proportionality] decision is not a

Thus, the Florida Supreme Court does not act as a resentencer when reviewing death sentences. The Florida Supreme Court does not conduct its own independent evaluation of the evidence in capital cases for purposes of reaching a sentencing decision, nor does it have the authority to overturn a death sentence (or for that matter to enter one) where the sentence imposed is supported properly.[21] Consequently, the Florida Supreme Court does not act as a resentencing court on direct appeal.

reweighing of aggravating and mitigating circumstances"); *Freeman v. State*, 563 So.2d 73, 77 (Fla. 1990) ("It is not this Court's function to reweigh these circumstances").

[21] Eleventh Circuit Chief Judge Tjoflat has cited some pre-*Brown* cases as illustrating confusion about the appellate role played by the Florida Supreme Court when it reviewed death sentences on direct appeal. *Ford v. Strickland*, 696 F.2d 804, 837 (11th Cir. 1982), *cert. denied*, 464 U.S. 865 (1983) (Tjoflat, J., concurring and dissenting) (citing *Elledge v. State*, 346 So.2d 998 (Fla. 1977), *cert. denied*, 459 U.S. 981 (1982); *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974) and *Ford v. State*, 374 So.2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980)); *Booker v. Dugger*, 922 F.2d 633, 636 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 277 (1991) (Tjoflat, J., specially concurring) (citing *Goode v. State*, 365 So.2d 381 (Fla. 1978)).

The cases cited by Judge Tjoflat are not confusing in light of the Florida Supreme Court's definitive opinion in *Brown*. First, all were decided pre-*Brown*. Second, the cases are consistent with *Brown* itself. These cases represented the proportionality review that the Florida Supreme Court conducts prior to affirming or vacating a death sentence, not resentencing. *See Lewis v. State*, 568 So.2d 18, 23 (Fla. 1991) (Florida Supreme Court's proportionality review does not involve reweighing of aggravating and mitigating circumstances); *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla. 1988) (same). In none of those cases was the court purporting to reassess the evidence for purposes of imposing a sentence.

This is suggested by the fact that the Florida Supreme Court did not sentence the condemned appellant in *Elledge* after finding harmful error. If the court acted as a resentencer, it would have reevaluated the record without considering the impermissible evidence, weighed the aggravating and mitigating factors and imposed a sentence. However, since the court was not a sentencer, it remanded the case for resentencing by the trial court. *Elledge*, 346 So.2d at 1003.

CONCLUSION

Florida has chosen to make the capital sentencing jury the principal actor is deciding who dies in Florida. That leading role is not diminished by the duties of the supporting actors: the trial judge and the Florida Supreme Court. For this reason, the jury--the only real sentencer in Florida—must be told the limiting definitions of the facially vague heinousness aggravating circumstance.

Respectfully submitted,

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* Barbara Junge, a second year law student at the New York University School of Law, provided invaluable assistance on this brief.

APPENDICES

APPENDIX A

FLORIDA SUPREME COURT LIFE OVERRIDE DECISIONS ON DIRECT APPEAL, 1974-DECEMBER 1991

Since 1974, the Florida Supreme Court has rendered 127 opinions on direct appeal in capital cases in which a sentence of death was imposed by the trial court following a jury recommendation of life imprisonment. These 127 decisions involved 118 condemned people, since in one case (Ziegler) the override was affirmed twice by the Florida Supreme Court, in four cases (Dobbert, Spaziano, Porter, and Engle) the override was affirmed after that court had remanded the matter for further sentencing proceedings, and in four cases (Douglas, Barclay, Buford, and McCrae) the Florida Supreme Court imposed a life sentence on direct appeal after it had initially affirmed the override, but the sentence had been subsequently set aside in collateral proceedings.

Of the total 127 jury override cases considered on direct appeal, the Florida Supreme Court has set aside the death sentence and imposed a sentence of life in 78, reversed the conviction in 12, remanded for further sentencing proceedings in five, and affirmed the override in 33. The cases total 128, because in one double jeopardy case (Wright in 1991) the court both reversed the conviction and ordered the trial court to impose a life sentence should the prisoner be reconvicted of first degree murder.

The year by year breakdown of affirmances, life sentences, reversals, and remands for further sentencing is set out below. Following this breakdown is a listing of the Florida Supreme Court's direct appeal jury override decisions.

Year	Life Mandated	Death Aff'd	Conviction Rev'd	Remanded	Total
1991	10	1	1	0	12
1990	5	0	0	0	5
1989	5	1	0	0	6
1988	8	1	1	0	10
1987	5	1	0	0	6
1986	4	1	3	0	8
1985	2	4	1	0	7
1984	2	7	2	0	11
1983	7	3	1	1	12
1982	4	3	2	0	9
1981	8	5	0	3	16
1980	3	0	1	0	4
1979	2	1	0	0	3
1978	2	1	0	0	3
1977	3	1	0	0	4
1976	4	1	0	1	6
1975	3	2	0	0	5
1974	1	0	0	0	1
Total	78	33	12	5	128

LISTING OF FLORIDA SUPREME COURT JURY OVERRIDE DECISIONS BY YEAR

Citation	Disposition
1991	
1. *Ziegler v. State*, 500 So.2d 127 (Fla. 1991).	Aff'd.
2. *Douglas v. State*, 575 So.2d 165 (Fla. 1991).	Life sentence on appeal.
3. *Downs v. State*, 574 So.2d 1095 (Fla. 1991).	Life sentence on appeal.
4. *Hegwood v. State*, 575 So.2d 170 (Fla. 1991).	Life sentence on appeal.
5. *Dolinski v. State*, 576 So.2d 271 (Fla. 1991).	Life sentence on appeal.
6. *Cooper v. State*, 581 So.2d 49 (Fla. 1991).	Life sentence on appeal.
7. *Wright v. State*, 586 So.2d 1024 (Fla. 1991).	Conviction reversed; death precluded on retrial, so in effect life sentence on appeal.
8. *McCrae v. State*, 582 So.2d 613 (Fla. 1991).	Life sentence on appeal.
9. *Craig v. State*, 585 So.2d 278 (Fla. 1991).	Life sentence on appeal.
10. *Bedford v. State*, 16 Fla. L. Week. S. 665, WL 1991 201666 (Fla. Oct. 10, 1991).	Life sentence on appeal.
11. *Savage v. State*, 16 Fla. L. Week. S. 647 (Fla. 1991).	Life sentence on appeal.

Citation	Disposition
1990	
1. *Morris v. State*, 557 So.2d 27 (Fla. 1990).	Life sentence on appeal.
2. *Hallman v. State*, 560 So.2d 223 (Fla. 1990).	Life sentence on appeal.
3. *Carter v. State*, 560 So.2d 1160 (Fla. 1990).	Life sentence on appeal.
4. *Cheshire v. State*, 568 So.2d 908 (Fla. 1990).	Life sentence on appeal.
5. *Buford v. State*, 570 So.2d 923 (Fla. 1990).	Life sentence on appeal.
1989	
1. *Thompson v. State*, 553 So.2d 153 (Fla. 1989).	Aff'd.
2. *Pentecost v. State*, 545 So.2d 861 (Fla. 1989).	Life sentence on appeal.
3. *Freeman v. State*, 547 So.2d 125 (Fla. 1989).	Life sentence on appeal.
4. *Cochran v. State*, 547 So.2d 928 (Fla. 1989).	Life sentence on appeal.
5. *Fuente v. State*, 549 So.2d 652 (Fla. 1989).	Life sentence on appeal.
6. *Christian v. State*, 550 So.2d 450 (Fla. 1989).	Life sentence on appeal.
1988	
1. *Torres-Arboledo v. State*, 524 So.2d 403 (Fla. 1988).	Aff'd.
2. *Brown v. State*, 526 So.2d 903 (Fla. 1988).	Life sentence on appeal.
3. *Burch* v. *State*, 522 So.2d 810 (Fla. 1988).	Life sentence on appeal.

Citation	Disposition
4. *Collier v. State*, 523 So.2d 158 1988).	Life sentence on appeal.
5. *DuBoise v. State*, 520 So.2d 260 (Fla. 1988).	Life sentence on appeal.
6. *Harmon v. State*, 527 So.2d 182 (Fla. 1988).	Life sentence on appeal.
7. *Holsworth v. State*, 522 So.2d 348 (Fla. 1988).	Life sentence on appeal.
8. *Perry v. State*, 522 So.2d 817 (Fla. 1988).	Life sentence on appeal.
9. *Spivey v. State*, 529 So.2d 1088 (Fla. 1988).	Life sentence on appeal.
10. *Merritt v. State*, 523 So.2d 573 (Fla. 1988).	Conviction reversed.
1987	
1. *Engle v. State*, 510 So.2d 881 (Fla. 1987).	Aff'd. after remand.
2. *Fead v. State*, 512 So.2d 176 (Fla. 1987).	Life sentence on appeal.
3. *Ferry v. State*, 507 So.2d 1373 (Fla. 1987).	Life sentence on appeal.
4. *Hansbrough v. State*, 509 So.2d 1081 (Fla. 1987).	Life sentence on appeal.
5. *Masterson v. State*, 516 So.2d 256 (Fla. 1987).	Life sentence on appeal.
6. *Wasko v. State*, 505 So.2d 1314 (Fla. 1987).	Life sentence on appeal.
1986	
1. *Echols v. State*, 484 So.2d 568 (Fla. 1986).	Aff'd.

Citation	Disposition
2. *Amazon v. State*, 487 So.2d 8 (Fla. 1986).	Life sentence on appeal.
3. *Brookings v. State*, 495 So.2d 135 (Fla. 1986).	Life sentence on appeal.
4. *Irizarry v. State*, 496 So.2d 822 (Fla. 1986).	Life sentence on appeal.
5. *Van Royal v. State*, 497 So.2d 625 (Fla. 1986).	Life sentence on appeal.
6. *Nelson v. State*, 490 So.2d 32 (Fla. 1986).	Conviction reversed.
7. *Ramos v. State*, 496 So.2d 121 (Fla. 1986).	Conviction reversed.
8. *Thompson v. State*, 494 So.2d 203 (Fla. 1986).	Conviction reversed.
1985	
1. *Brown v. State*, 473 So.2d 1260 (Fla. 1985).	Aff'd.
2. *Burr v. State*, 466 So.2d 1051 (Fla. 1985).	Aff'd.
3. *Francis v. State*, 473 So.2d 673 (Fla. 1985).	Aff'd.
4. *Mills v. State*, 476 So.2d 172 (Fla. 1985).	Aff'd.
5. *Barclay v. State*, 470 So.2d 691 (Fla. 1985).	Life sentence on appeal.
6. *Huddleston v. State*, 475 So.2d 204 (Fla. 1985).	Life sentence on appeal.
7. *Brown v. State*, 471 So.2d 6 (Fla. 1985).	Conviction reversed.
1984	
1. *Eutzy v. State*, 458 So.2d 755 (Fla. 1984).	Aff'd.

Citation	Disposition
2. *Gorham v. State*, 454 So.2d 556 (Fla. 1984).	Aff'd.
3. *Groover v. State*, 458 So.2d 226 (Fla. 1984).	Aff'd.
4. *Heiney v. State*, 447 So.2d 210 (Fla. 1984).	Aff'd.
5. *Lusk v. State*, 446 So.2d 1038 (Fla. 1984).	Aff'd.
6. *Parker v. State*, 458 So.2d 750 (Fla. 1984).	Aff'd.
7. *Thomas v. State*, 456 So.2d 454 (Fla. 1984).	Aff'd.
8. *Rivers v. State*, 458 So.2d 762 (Fla. 1984).	Life sentence on appeal.
9. *Thompson v. State*, 456 So.2d 444 (Fla. 1984).	Life sentence on appeal.
10. *Livingston v. State*, 458 So.2d 235 (Fla. 1984).	Conviction reversed.
11. *Livingston v. State*, 441 So.2d 1083 (Fla. 1984).	Conviction reversed.
1983	
1. *Routly v. State*, 440 So.2d 1257 (Fla. 1983).	Aff'd.
2. *Porter v. State*, 429 So.2d 293 (Fla. 1983).	Aff'd after remand.
3. *Spaziano v. State*, 433 So.2d 508 (Fla. 1983).	Aff'd after remand.
4. *Engle v. State*, 438 So.2d 803 (Fla. 1983).	Remand for judge resentencing.
5. *Cannady v. State*, 427 So.2d 723 (Fla. 1983).	Life sentence on appeal.
6. *Hawkins v. State*, 436 So.2d 44 (Fla. 1983).	Life sentence on appeal.

Citation	Disposition
7. *Herzog v. State*, 439 So.2d 1372 (Fla. 1983).	Life sentence on appeal.
8. *Norris v. State*, 429 So.2d 638 (Fla. 1983).	Life sentence on appeal.
9. *Richardson v. State*, 437 So.2d 1091 (Fla. 1983).	Life sentence on appeal.
10. *Washington v. State*, 432 So.2d 44 (Fla. 1983).	Life sentence on appeal.
11. *Webb v. State*, 433 So.2d 496 (Fla. 1983).	Life sentence on appeal.
12. *Andrews v. State*, 443 So.2d 78 (Fla. 1983).	Conviction reversed.
1982	
1. *Bolender v. State*, 422 So.2d 833 (Fla. 1982).	Aff'd.
2. *Miller v. State*, 415 So.2d 1262 (Fla. 1982).	Aff'd.
3. *Stevens v. State*, 419 So.2d 1058 (Fla. 1982).	Aff'd.
4. *Gilvin v. State*, 418 So.2d 996 (Fla. 1982).	Life sentence on appeal.
5. *McCampbell v. State*, 421 So.2d 1072 (Fla. 1982).	Life sentence on appeal.
6. *McCray v. State*, 416 So.2d 804 (Fla. 1982).	Life sentence on appeal.
7. *Walsh v. State*, 418 So.2d 1000 (Fla. 1982).	Life sentence on appeal.
8. *Bryant v. State*, 412 So.2d 347 (Fla. 1982).	Conviction reversed.
9. *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982).	Conviction reversed.
1981	
1. *Buford v. State*, 403 So.2d 943 (Fla. 1981).	Aff'd.

Citation	Disposition
2. *Johnson v. State*, 393 So.2d 1069 (Fla. 1981).	Aff'd.
3. *McCrae v. State*, 395 So.2d 1145 (Fla. 1981).	Aff'd.
4. *White v. State*, 403 So.2d 331 (Fla. 1981).	Aff'd.
5. *Ziegler v. State*, 402 So.2d 365 (Fla. 1981).	Aff'd.
6. *Lewis v. State*, 398 So.2d 432 (Fla. 1981).	Remand for judge sentencing.
7. *Spaziano v. State*, 393 So.2d 1119 (Fla. 1981).	Remand for judge resentencing.
8. *Porter v. State*, 400 So.2d 5 (Fla. 1981).	Remand for limited hearing.
9. *Barfield v. State*, 402 So.2d 377 (Fla. 1981).	Life sentence on appeal.
10. *Goodwin v. State*, 405 So.2d 170 (Fla. 1981).	Life sentence on appeal.
11. *Jacobs v. State*, 396 So.2d 713 (Fla. 1981).	Life sentence on appeal.
12. *McKennon v. State*, 403 So.2d 389 (Fla. 1981).	e sentence on appeal.
13. *Odom v. State*, 403 So.2d 936 (Fla. 1981).	Life sentence on appeal.
14. *Smith v. State*, 403 So.2d 933 (Fla. 1981).	Life sentence on appeal.
15. *Stokes v. State*, 403 So.2d 377 (Fla. 1981).	Life sentence on appeal.
16. *Welty v. State*, 402 So.2d 1159 (Fla. 1981).	Life sentence on appeal.

Citation	Disposition
1980	
1. *Neary v. State*, 384 So.2d 881 (Fla. 1980).	Life sentence on appeal.
2. *Phippen v. State*, 381 So.2d 991 (Fla. 1980).	Life sentence on appeal.
3. *Willams v. State*, 386 So.2d 538 (Fla. 1980).	Life sentence on appeal.
4. *Hall v. State*, 381 So.2d 683 (Fla. 1980).	Conviction reversed.
1979	
1. *Dobbert v. State*, 375 So.2d 1069 (Fla. 1979).	Affirmed after remand.
2. *Brown v. State*, 367 So.2d 616 (Fla. 1979).	Life sentence on appeal.
3. *Malloy v. State*, 382 So.2d 1190 (Fla. 1979).	Life sentence on appeal.
1978	
1. *Hoy v. State*, 353 So.2d 826 (Fla. 1978).	Aff'd.
2. *Buckrem v. State*, 355 So.2d 111 (Fla. 1978).	Life sentence on appeal.
3. *Shue v. State*, 366 So.2d 387 (Fla. 1978).	Life sentence on appeal.
1977	
1. *Barclay v. State*, 343 So.2d 1266 (Fla. 1977).	Aff'd.
2. *Burch v. State*, 343 So.2d 831 (Fla. 1977).	Life sentence on appeal.
3. *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977).	Life sentence on appeal.

Citation	Disposition
4. *Williams v. State*, 344 So.2d 1276 (Fla. 1977).	Life sentence on appeal.
1976	
1. *Douglas v. State*, 328 So.2d 18 (Fla. 1976).	Aff'd.
2. *Chambers v. State*, 339 So.2d 204 (Fla. 1976).	Life sentence on appeal.
3. *Jones v. State*, 332 So.2d 615 (Fla. 1976).	Life sentence on appeal.
4. *Provence v. State*, 337 So.2d 783 (Fla. 1976).	Life sentence on appeal.
5. *Thompson v. State*, 328 So.2d 1 (Fla. 1976).	Life sentence on appeal.
6. *Dobbert v. State*, 328 So.2d 433 (Fla. 1976).	Affirmed, but later remanded for limited hearing (see 1979).
1975	
1. *Gardner v. State*, 313 So.2d 675 (Fla. 1975).	Aff'd.
2. *Sawyer v. State*, 313 So.2d 680 (Fla. 1975).	Aff'd.
3. *Slater v. State*, 316 So.2d 539 (Fla. 1975).	Life sentence on appeal.
4. *Swan v. State*, 322 So.2d 485 (Fla. 1975).	Life sentence on appeal.
5. *Tedder v. State*, 322 So.2d 908 (Fla. 1975).	Life sentence on appeal.
1974	
1. *Taylor v. State*, 294 So.2d 648 (Fla. 1974).	Life sentence on appeal.

APPENDIX B

DISPOSITION OF THE FIRST 66 FLORIDA CAPITAL HOMICIDE CASES ON APPEAL

Disposition	No.	%
Conviction and Sentence Affirmed	33	50
Jury Recommendation: Life	(5)	(5)
Jury Recommendation: Death	(25)	(76)
Not available (or no jury)	(3)	(9)
Conviction Reversed	8	12
Sentence Invalidated for Procedural Reasons	10	15
Sentence Reduced on Merits	15	23
Jury Recommendation: Life	(13)	(88)
Jury Recommendation: Death	(1)	(6)
Not available (or no jury)	(1)	(6)
	66	100

Source: Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 125 (1979).

APPENDIX C

DELAWARE'S 1991 CAPITAL STATUTE

1. S.B. 91, Substitute 1

DELAWARE STATE SENATE
136TH GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1, OCTOBER 24, 1991
TO
SENATE BILL, NO. 79

AN ACT TO AMEND TITLE 11, DELAWARE CODE RELATING TO THE IMPOSITION OF THE DEATH PENALTY

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Section 4209(c)(3). Title 11, Delaware Code by striking subsection (c)(3) in its entirety and inserting in lieu thereof the following:

(3)(a) Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to deliberate and recommend to the Court an answer to the following questions:

(i) Whether the evidence shows beyond a reasonable doubt the existence of at least one aggravating circumstance as enumerated in subsection (e) of this section; and

(ii) Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities

of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

(b) The jury shall report to the Court its final vote by the number of each affirmative and negative votes on each question.

Section 3. Amend Section 4209(d). Title 11, Delaware Code by striking Section 4209(d) in its entirety and inserting in lieu thereof the following:

(d) Determination of sentence. (1) A sentence of death shall be imposed, after considering the recommendation of the jury, if a jury is impaneled, if the Court finds:

(1) (a) Beyond a reasonable doubt at least one statutory aggravating circumstance; and

(b) By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist.

(2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.

(3) If the Court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence or death is based.

Section 3. Amend Section 4209(c)(1) by striking the words "jury, unanimously, or judge when applicable," and inserting in lieu thereof the word "judge."

Section 4. Amend Section 4209(g)(2) by striking the words "jury's or."

Section 5. Amend Section 4209(g)(4) by striking subsection (b) and relettering the remaining subsections

Section 6. This act shall become effective immediately upon the signature of the Governor and shall apply to all defendants tried or sentenced after its effective date.

2. Certificate of Questions of Law, *State v. Cohen*

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Criminal Action Numbers IN-90-02-0474
through IN-90-02-0477

STATE OF DELAWARE

v.

CHARLES M. COHEN,
Defendant.

CERTIFICATE OF QUESTIONS OF LAW

This 6th day of November, 1991, the Court having found that:

1. The nature and stage of the proceedings are:

(a) The above-captioned case is a capital murder case.

(b) Jury selection was scheduled to start on Novber 5, 1991. Trial was scheduled to start on November 25, 1991.

(c) On Monday, November 4, 1991, the Governor signed Senate Substitute 1 for Senate Bill 79 which amends 11 *Del. C.* § 4209 relating to the imposition of the death penalty, now Vol. 68, Ch. 181 *Del. Laws* [new law].

(d) The defendant has moved to preclude application of the new law to the determination of the defendant's punishment.

(e) The Court indicated to counsel at an office conference held immediately following learning of the Governor's signature that it was inclined to certify various issues (see below) which would necessarily cause a delay in jury selection and trial. Notice of excusal of jurors was communicated by media and the Court's message phone after 6:00 p.m. on November 4, 1991. A tentative new trial date of February 12, 1992 has been set.

(f) The State agrees that certification should be sought. The defendant prefers that the issues raised herein be decided by this Court. The defendant claims his right to a speedy trial is denied by any further delay.

2. The following facts are undisputed:

(a) The defendant is accused of two murders which allegedly occurred on or about November 12, 1988.

(b) On the date of the alleged murders, the statutory process for the determination of the defendant's punishment, if found guilty, was determined by 11 *Del. C.* § 4209 as it existed prior to the enactment of the new law.

(c) Section 6 of the new law provides:

> This act shall become effective immediately upon the signature of the Governor and shall apply to all defendants tried or sentenced after its effective date.

(d) By virtue of this provision, the defendant in this case would be covered by the new law.

(e) The State has informed the Court that the new law applies to this defendant.

(f) In the new law, the jury, at the penalty phase, makes a recommendation to the Court by way of answers to the following questions:

(i) Whether the evidence shows beyond a reasonable doubt the existence of at least one statutory aggravating circumstance as enumerated in 11 *Del. C.* § 4209(c); and

(ii) Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating factors found to exist.

(g) Under the new law, the jury makes a report to the trial judge of its answers stating the number of affirmative and negative votes on each of the above two questions.

(h) Under the new law, the next step in the punishment determination is as follows:

(1) A sentence of death shall be imposed, after considering the recommendation of the jury, if a jury is impaneled, if the Court finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that

the aggravating circumstances found *by the Court* to exist outweigh the mitigating circumstances found *by the Court* to exist.

(2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.

(3) If the Court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based.

(i) Under 11 *Del. C.* § 4209, as it existed on November 12, 1988 and up to November 4, 1991, the:

(i) jury could find that aggravating circumstances existed and that such aggravating circumstances outweigh the mitigating circumstances but still decide that the death penalty should not be imposed; and

(ii) trial judge was bound by the jury's verdict in that circumstance and was required to impose a sentence of life without benefit of probation or parole.

(j) Under the new law, effective November 4, 1991:

(i) the jury, after making certain finds, makes a recommendation to the trial judge; and

(ii) the trial judge is not bound by the jury's recommendation; and

(iii) if the trial judge finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after weighing certain factors, finds by a preponderance of the evidence that the aggravating circumstances outweigh the mitigating circumstances, the trial judge shall impose the death penalty.

3. The questions of law set forth below should be certified to the Supreme Court of the State of Delaware for the following reasons:

(a) The new law changes the manner in which the determination of the defendant's potential punishment, if any, is determined.

(b) The new law, by its own provisions, is retroactive to this defendant who allegedly committed two murders prior to its enactment.

(c) The Superior Court of the State of Delaware currently has pending capital murder cases against sixteen defendants (statewide). In all these cases, the alleged crimes occurred prior to the enactment of the new law.

(d) The new law contains no severability clause and no savings clause. It repeals the former provisions of 11 *Del. C.* § 4209 which provided for the jury to determine punishment.

(e) Should the new law be found to be unconstitutional in its entirety, the question arises whether Delaware would be left without a death penalty for first degree murder.

(f) The new law removes from the jury the determination of punishment in capital cases and places that responsibility in the hands of the trial judge.

(g) The questions of law involved relate to the constitutionality of the new law, the constitutionality of its retroactive application, to its construction and application which have not been, but should be settled, by the Delaware Supreme Court.

4. The important and urgent reasons for an immediate determination by the Supreme Court of the questions certified are:

(a) Should the new law be declared to be unconstitutional in its entirety and to have repealed the former law, Delaware could be left without a death penalty for first degree murder which would appear to be inconsistent with the wishes of the General Assembly and the Governor.

(b) Of the above-described sixteen pending capital defendants, six, including this case, are scheduled to start jury selection between today's date and January 6, 1992 (November 13, 1991, December 2, 1991, December 4, 1991 and January 6, 1992).

(c) Lack of resolution of the constitutional issues created by the enactment of the new law prior to the trial of this case and the five others now scheduled for the trial could cause unnecessary appeals, extraordinary expense, delay, confusion and possible retrial(s).

(d) The constitutional issues involved with this case caused by the enactment of the new law transcend all pending cases. One adversarial proceeding in the Supreme Court by means of certification prior to the commencement of any pending capital case could remove all potential confusion and later harm or disruption created by proceeding to trial without certification and following the normal appellate process.

(e) Defense counsel have indicated that proposed *voir dire* questions would have to be altered by virtue of the new law. Specifically, the defense claims any trial and/or penalty jury would no longer have to be "death qualified". This Court tends to agree that additional new and significantly different questions may have to be asked because of the new law. This Court is reluctant to so amend those questions without knowing the answers to the questions to be certified, that

is, whether the new law is constitutional or unconstitutional.

(f) The Supreme Court has historically accepted certification of questions similar to those raised in this case. *State v. Dickerson*, Del. Supr., 298 A.2d 761 (1972); *State v. White*, Del. Supr., 395 A.2d 1082 (1978).

5. Counsel for the parties are:

(a) For the State:

Stephen M. Walther, Esq.
Assistant State Prosecutor
Robert J. O'Neill, Jr., Esq.
Deputy Attorney General

(b) For the defendant:

J. Dallas Winslow, Jr., Esq.
Nancy Jane Perillo, Esq.
Assistant Public Defenders

6. The Court recommends and the parties have agreed to the following order for briefing:

(a) Defendant's opening brief
(b) State's answering brief
(c) Defendant's reply brief

The parties have requested, and this Court recommends, consistent with the issues involved, an expedited schedule.

NOW, THEREFORE, IT IS ORDERED that the following questions of law are certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 41 of the Supreme Court:

1. Does the new law mandate imposition of a death penalty, if the sentencing Court makes its findings required under 11 *Del. C.* § 4209(d)(1)(a) and (b) against the defendant?

2. If the answer to certified question 1 is "yes," does the new law violate the Eighth Amendment to the United States Constitution and/or the cruel punishments' clause of Article 1, Section 11 of the Delaware Constitution?

3. If the answer to certified question 1 is "yes," does the new law violate the due process clause of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment to the United States Consitution, the due process clause of Article 1, Section 7 of the Delaware Constitution and/or the cruel punishments' clause of Article I, Section 11 of the Delaware Constitution, in that a death sentence is mandated without a finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt?

4. Does the new law, by designating the Court as the sentencing authority in capital cases here, violate the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and/or Article I, Section 4, and Article IV, Section 19 of the Delaware Constitution and related Delaware statutory and court rule provisions, to a trial by jury on the issue of punishment?

5. Should the new law be found constitutionally inform under any of the grounds set forth in certified questions 2, 3 or 4, what law applies to the sentencing of defendants convicted of first degree murder for offenses committed prior to the effective date of those provisions?

6. Should the new law be found constitutionally infirm under any of the grounds set forth in certified questions 2, 3, or 4, what law applies to the sentencing of defendants convicted of first degree murder for offenses committed after the effective date of those provisons?

7. Should the revised provisions of the new law be found constitutionally or otherwise infirm in any limited respect, are those provisions severable?

8. Is the application of the new law to all defendants tried or sentenced after its effective date violative of the *ex post facto* clause of Article I, Section 10 of the United States Constitution or any other provision of the United States Constitution?

9. Is the application of the new law to all defendants tried or sentenced after its effective date violative of the due process clause of Article I, Section 7 of the Delaware Constitution with respect to the determination of punishment or any other provision of the Delaware Constitution?

10. Since the new law provides that the jury make a recommendation only, does the jury have to be "death qualified?"

/s/ [Illegible]